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Supreme Court, U.S.
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No. 95-125

In The

Supreme Court of the United States

October Term, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

CITY OF KANSAS CITY, MISSOURI,

Respondent.

On Petition For A Writ Of Certiorari
To The Missouri Court Of Appeals,
Western District

BRIEF IN OPPOSITION

CITY OF KANSAS CITY,
MISSOURI

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QUESTIONS PRESENTED

1. Whether jurisdiction lies with the Supreme Court under 28 U.S.C. §1257(a) when the federal question was first presented to the state intermediary court after the highest court of the State of Missouri issued a mandate to the state intermediary court?

2. Whether a due process violation occurs when a certain and clear statutory remedy is available prior to the adverse decision and the same remedy is available after the adverse decision?

RULE 29.1 LISTING

Petitioner General Motors Corporation has listed its parent and subsidiary companies in its Petition for a Writ of Certiorari. That listing is incorporated by reference.

Respondent City of Kansas City, Missouri is a municipal corporation with no parent or subsidiary companies and is a political subdivision of the State of Missouri.

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STATUTES CITED:

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OPINIONS BELOW

The Missouri Court of Appeals affirmed the trial court's grant of summary judgment in favor of the city in its opinion reported at 895 S.W.2d 59. The order of the Missouri Supreme Court retransferring the matter back to the Court of Appeals is unreported and appears as Appendix B to the Petition. The orders of the Missouri Supreme Court and of the Court of Appeals are unreported and appear as Appendices G and H to the Petition. The decision of the Court of Appeals is unreported and appears as Appendix C to the Petition. The original

decision of the trial court granting summary judgment in favor of the City appears as Appendix E to the Petition.

JURISDICTION

Respondent asserts that the Court lacks the jurisdiction Petitioner invokes under 28 U.S.C. §1257(a).

STATUTE INVOLVED

Mo. Rev. Stat. §139.031.1 (1986)

1. Any taxpayer may protest all or any part of any taxes assessed against him, except taxes collected by the director of revenue of Missouri. Any such taxpayer desiring to pay any taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based. The statement shall include the true value in money claimed by the taxpayer if disputed.

STATEMENT OF THE CASE

On December 29, 1989, Petitioner (hereinafter "GM") filed its lawsuit against the City of Kansas City, Missouri (hereinafter "City") alleging that the City's occupational license tax, as applied to GM, violated the Commerce Clause. The City moved to dismiss on the ground that GM's action was barred as it had not paid its taxes under protest in accord with Mo. Rev. Stat. §139.031 (1986). The

trial court denied this motion but granted summary judgment in favor of the City finding that the City's tax did not violate the Commerce Clause as applied to GM.

GM appealed to the Missouri Court of Appeals, Western District. Again, the City raised the issue that GM failed to pay its taxes under the protest provisions of Mo. Rev. Stat. §139.031 (1986) and both parties briefed the issue. On February 22, 1994, the Court of Appeals issued its opinion ruling against the City on the protest issue and finding that the City's tax as applied to Petitioner violated the Commerce Clause.

The City appealed to the Missouri Supreme Court. On August 15, 1994, the Missouri Supreme Court accepted the matter and retransferred it to the Western District Court of Appeals to be decided in light of *Armco Steel v. City of Kansas City*, 883 S.W.2d 3 (Mo. *banc* 1994). Petitioner filed no motion for reconsideration of that decision.

On January 10, 1995, the Court of Appeals, after denying Petitioner's motion for opportunity for additional briefing and argument of the case, ruled that GM's failure to pay the taxes under protest barred its right to recovery and affirmed the trial court's grant of summary judgment in favor of the City. GM's subsequent Motion for Rehearing was denied by the Court of Appeals and the Missouri Supreme Court denied GM's Application for Transfer.

REASONS FOR DENYING THE WRIT

The Supreme Court lacks jurisdiction in this matter as the federal question Petitioner presents was not presented nor addressed in the state courts even though the claim was available and should have been raised. The parties fully briefed and argued the applicability of the protest provisions of Mo. Rev. Stat. §139.031 (1986) and yet, Petitioner did not raise a due process argument until after the case had been accepted by the Missouri Supreme Court and transferred back to the Court of Appeals. Petitioner had a clear and certain remedy in Mo. Rev. Stat. §139.031 (1986) to recover tax money paid to the city. Petitioner failed to avail itself of that remedy. The Petition for Writ of Certiorari should be denied.

I. THE WRIT SHOULD BE DENIED BECAUSE GM FAILED TO PROPERLY PRESERVE ITS CASE FOR APPEAL.

The Petition for a Writ of Certiorari should be denied as this Court has no jurisdiction over this matter as Petitioner failed to properly raise the federal question to bring this matter within the ambit of 28 U.S.C. §1257(a).

Petitioner had opportunity and reason to raise its due process argument at the trial court level, at the Missouri Court of Appeals, and at the Missouri Supreme Court. At each of these stages of litigation, the parties briefed the applicability of the tax protest provisions of Mo. Rev. Stat. §139.031 (1986) to the case at bar. Petitioner failed to raise any due process argument during the briefing and argument of this litigation and thus must be deemed to have waived the right to raise such argument. *Pruellage v.*

DeSeaton Corp., 380 S.W.2d 403 (Mo. 1964). In fact, Petitioner did not raise its due process argument until after the matter had been decided by the Missouri Court of Appeals, accepted by the Missouri Supreme Court and transferred the case back to the Court of Appeals with the mandate that the case be decided in light of *Armco Steel v. City of Kansas City*, 883 S.W.2d 3 (Mo. *banc* 1994). No Missouri appellate court had before it, nor did it consider, any due process argument.

Petitioner first raised its due process claim in a motion to supplement the record which was filed after the Missouri Supreme Court issued its mandate to the Court of Appeals that the case be decided in accord with *Armco*, 883 S.W.2d 3 which had just been decided.

Petitioner argues in its Petition that *Armco*, 883 S.W.2d 3 created a new and unexpected claim and that it raised the federal question at the earliest possible time thus bringing this matter within the Court's jurisdiction. However, the *Armco*, decision cannot be deemed to be completely unanticipated as the applicability of Mo. Rev. Stat. §139.031 (1986) had been briefed and argued. The Court lacks jurisdiction which Petitioner asserts exists by virtue of 28 U.S.C. §1257(a). *Herndon v. Georgia*, 295 U.S. 441 (1935) (Holding that the Supreme Court lacks jurisdiction to hear a federal question first presented in a motion for rehearing unless the claim could not have been anticipated in the original hearing). In *Armco*, 883 S.W.2d 3 the Missouri Supreme Court decided, as a matter of first impression, that the protest provisions of Mo. Rev. Stat. §139.031 (1986) applied to the municipal taxes. The Missouri courts had never before examined whether the protest provisions of Mo. Rev. Stat. §139.031 (1986)

applied to municipal taxes other than real property taxes. But the decision of *Armco*, 883 S.W.2d 3 certainly should not have been unexpected. Other taxpayers, such as the plaintiffs in *Armco*, 883 S.W.2d 3 paid municipal taxes under protest because the Mo. Rev. Stat. §139.031 (1986) protest provisions existed and had been in place for many years. The City in the trial court and in the Court of Appeals had certainly raised the issue which should have put Petitioner on notice that the possibility existed that Mo. Rev. Stat. §139.031 (1986) might apply to the taxes involved in this matter.

Petitioner's purported due process argument has never been an issue in this case. Petitioner failed to properly preserve its federal question by raising its constitutional argument at the earliest possible opportunity and keeping it alive through every stage in the proceeding; a federal question raised for the first time in a motion for rehearing is too late. *Pim v. St. Louis*, 165 U.S. 273 (1897). Since Petitioner failed to properly preserve its federal question, this Court lacks jurisdiction to grant the requested Writ.

II. PETITIONER'S CLEAR AND CERTAIN REMEDY EXISTS IN MO. REV. STAT. 139.031 (1986).

The clear and certain remedy for Missouri taxpayers to seek a refund of taxes has been found in Mo. Rev. Stat. §139.031 (1986) since 1969. *Armco*, 883 S.W.2d at 7. Petitioner argues that under *Reich v. Collins*, 513 U.S. ___, 115 S.Ct. 547 (1994), it has been denied a clear and certain remedy. *Reich* does not control the case at bar. In *Reich*, the Court set forth a two-prong test to determine the

legality of the matter presented. First, there must be a determination that the tax assessed was unlawful. Second, the taxpayer must be denied a remedy that was previously clear and certain, well settled law. In the case at bar, neither prong is satisfied.

Petitioner premises its due process argument on the ground that the court's order denied Petitioner the opportunity to pursue its remedy for an unconstitutional tax. Petitioner's argument must fail as there currently exists no binding determination of the unconstitutionality of the tax. The Court of Appeals' opinion filed on January 10, 1995, affirmed the trial court's grant of summary judgment to the City and found that "GM's recovery is barred by its failure to make or file a written protest at the times it paid the license taxes as required by §139.031 R.S.Mo." (Mo.App. Opinion, pp. 1-2). The trial court found the City's tax to be constitutional. No binding judicial determination exists which provides that the City's license fee violates any constitutional provision. So, even if Petitioner was allowed to make a due process argument at this late date, it must fail as the Missouri Court of Appeals affirmed the trial court's grant of summary judgment in favor of the City.

Even if the final order of the court found the tax as applied against Petitioner to be unconstitutional, the case at bar fails to meet the second prong of the *Reich* test. The clear and certain remedy available to Petitioner before *Armco*, 883 S.W.2d 3 was Mo. Rev. Stat. §139.031 (1986). The clear and certain remedy available to Petitioner after *Armco*, 883 S.W.2d 3 is still Mo. Rev. Stat. §139.031 (1986). No well settled law in Missouri has ever stated otherwise. *Armco*, 883 S.W.2d at 8.

Petitioner has not been denied what was previously known by well settled law to be an available remedy. As the Missouri Court of Appeals stated in its opinion filed on January 10, 1995:

> In *Armco*, the Supreme Court addressed an issue of first impression, interpreting §139.031 as it believed the legislature intended all along. *Armco*, 883 S.W.2d at 7-8. The court did not change an earlier interpretation on the issue of city tax collection; nor did the legislature enact a new statute which the court is attempting to apply retroactively. Parties are presumed to know the law and cannot normally avoid an act or deed on the ground that they were ignorant of the law. See *Shearin v. Fletcher/Mayo Associates*, 687 S.W.2d 198, 202 (Mo. App. 1984). GM had a duty to comply with §139.031. It failed to satisfy this duty and cannot now claim ignorance as an excuse.

Petitioner had available the remedy of paying its taxes under the Mo. Rev. Stat. §139.031 (1986) protest provisions prior to the *Armco* decision and after the *Armco* decision. Unlike the cases which Petitioner cites in its Petition, no clear statute was repealed, no matter of well settled law was changed. This was a matter of first impression in Missouri. It was not a "novel or unexpected" interpretation. A reasonably prudent taxpayer would have followed the Mo. Rev. Stat. §139.031 (1986). protest provisions. This is most clearly evidenced by the fact that other taxpayers, such as the plaintiffs in *Armco* did follow this statutory provision.

The application of the protest provisions of Mo. Rev. Stat. §139.031 (1986) to the case at bar does not give rise to a due process claim. The statutory language of Mo. Rev. Stat. §139.031 (1986) provides the clear and certain remedy the law requires. The fact that Petitioner failed to avail itself of this clear and certain remedy does not now give rise to a due process claim. *Campbell v. Olney*, 262 U.S. 352 (1923) (holding that one cannot claim denial of due process when one fails to avail himself of his opportunity to be heard).

CONCLUSION

The Petition for Writ of Certiorari should be denied as the Court has no jurisdiction over this matter because no title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States as required by 28 U.S.C. §1257(a).

Respecfully submitted,

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